Supreme Court, U. S.
FILED
JUL 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-74

IN THE SUPREME COURT

UNITED STATES OF AMERICA

MELESIO MANUEL TAPIA - ACUNA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
(From Ninth Circuit)

Wayne A. Cypert
555 Morley Avenue
Nogales, Arizona 85621
(602) 287-2519

Attorney for Petitioner

Two questions are presented for review:

1. Is the discretionary relief set forth in 8 USC §1182 (c) available to an alien found deportable for conviction of a drug related crime pursuant to 8 USC §1251 (a)(11)?. The Ninth Circuit has ruled repeatedly that such an alien is not eligible for the said discretionary relief; Petitioner asserts that he <u>is</u> eligible to apply for this discretionary relief.

2. Is a lawfully admitted alien for permanent residence deportable for conviction of a drug related crime even though his State conviction has been set aside pursuant to Arizona's Restoration of Civil Rights act?. The Ninth Circuit has ruled that a State conviction retains its vitality for deportation purposes even though the State has judicially ordered the conviction set aside pursuant to the Restoration of Civil Rights act; Petitioner asserts otherwise.

TABLE OF CONTENTS

		PAGE:
1.	Questions presented	i
2.	Table of Contents	ii
3.	Table of Cases and Statutes	iii
4.	Petition for Writ of Certiorari	1
5.	Appendix Index	11
6.	Certificate of Service	12

TABLE OF CASES & SATUTES CITED

CASES:	PAGE:
BOWE vs. INS 597 F2d 1158 (1979)	9
DE LA CRUZ - MARTINEZ vs. INS 404 F2d 1198 (1968)	9
DOE vs. WEBSTER 606 F2d 1226 (D. C. Circuit 1979)	8
DUNN vs. INS 499 F2d 856 (1974)	9
GONZALEZ de LARA vs. U. S. 439 F2d 1316 (1971)	9
GUTIERREZ - RUBIO vs. INS 453 F2d 1243 (1972)	9
KELLY vs. INS 349 F2d 473 (1965)	9
MORERA vs. INS 462 F2d 1030 (1st Circuit - 1972)	8
OCON - PEREZ vs. INS 550 F2d 1153 (1977)	9
Re HINOJOSA (1979) I & N Interim Decision No. 2718	10
Re J (1957) Board of Immigration Appeals 7 I & N Dec. 580	8
Re Tanori (1976) I & N Interim Decision 2467	10
Re Werk (1977) Board of Immigration appeals I & N Interim Dec. No. 2589	8

Table of Cases & Statutes cited (cont'd)

	PAGE:
RHEMAN vs. INS 544 F2d 71 (2nd Circuit - 1976)	8

STATUTES:

8 USC §1105 A	6, 7
8 USC §1182 (c)	2, 4, 5, 7, 9
8 USC §1251 (a)(11)	2, 4, 8
21 USC §844 (b)(1)	8
28 USC §1254, 2101, 2106	2
A.R.S. former §36-1002.06	4
A.R.S. former §13-1741, 42, 44, and 45	2
Supreme Court Rule 17.	7

PETITION FOR WRIT OF CERTIORARI

A. This Petition for Writ of Certiorari is based upon the action of the United States Court of Appeals for the Ninth Circuit in Melesio Manuel Tapia-Acuna, Petitioner, vs. Immigration and Naturalization Service, Respondent, No. 79-7116, which resulted in a Memorandum Decision filed April 30th, 1980. The Memorandum Decision appears in the Appendix at page IX.

After the filing of the Memorandum Decision by a three judge panel in the Ninth Circuit, a Petition for Rehearing and suggestion for rehearing en banc was filed approximately on May 10th, 1980. On June 12th, 1980, an Order was issued out of the Ninth Circuit denying the Petition for Rehearing and the suggestion for rehearing en banc was rejected. Thereafter, on or about June 17th, 1980, Petitioner filed an Emergency Motion for Stay of Mandate so that application to the United States Supreme

Court may be made for a Writ of Certiorari, On June 25th, 1980, Judge Ferguson, for the Ninth Circuit, stayed the issuance of mandate until July 18th, 1980, so that a Petition for Writ of Certiorari could be filed in the United States Supreme Court. The Statutory provisions believed to confer upon this Court's jurisdiction to review by Writ of Certiorari the above referenced matter are: 28 USC §2101, 2016, and 1254.

B. The statutes which the case involves are: 8 USC §1251 (a)(11); 8 USC §1182 (c); A.R.S. former §13-1741, 42, 44, 45. The above sections are set forth in the Appendix at pages XII, XV, and XVI.

C. The facts material to consideration of the questions presented are as follows:

1. Petitioner Tapia entered the United States in July 3rd, 1963, as a child in the company of his parents for lawful permanent residence. He has continually resided in the United States and is the father of

young United States' citizens.

2. On July 31st, 1976, Petitioner was arrested by State of Arizona authorities for marijuana violations. On October 25th, 1976, the Petitioner admitted in Superior Court unlawful possession of marijuana for sale, pursuant to a plea agreement. The Court ordered that imposition of sentence be suspended for a period of three years upon the condition that the Petitioner pay a fine in the sum of $300.00 plus 10% surcharge. The Petitioner was further ordered to report to a Probation Officer at least once a month and ordered to conduct himself as a law abiding "citizen". The Arizona's Superior Court formal written judgment is dated November 1st, 1976.

3. On February 15th, 1977, an Immigration Order to Show Cause, and a Notice of Hearing were issued; it was charged that the Petitioner was deportable in that he had been convicted of a violation of law

related to the illicit possession of marijuana to-wit: A.R.S. §36-1002.06. The basis of the deportation was 8 USC §1251 (a)(11).

4. On April 27th, 1977, the deportation hearing was heard in Nogales, Arizona. The Immigration Judge ordered the Petitioner deported and denied discretionary relief pursuant to 8 USC §1182 (c).

5. The Petitioner thereafter timely filed a notice of appeal to the Board of Immigration Appeals.

6. On May 23rd, 1977, the Superior Court of the State of Arizona, issued a very broad order after finding that the statutory discretionary relief should be granted to the applicant. The relevant part of the order was as follows:

> "IT IS THEREFORE ORDERED that the Defendant's Probation shall be terminated, that the judgment of guilt previously entered on November first, 1976, shall be set aside, that the information herein shall be dismissed, and IT IS FURTHER ORDERED that Melesio Manuel Tapia be released from all penalties and

disabilities resulting from the conviction"

The Petitioner personally filed a copy of this order with the Immigration Office in Nogales, Arizona, on the same day, May 23rd, 1977. There was some delay in sending the record file to the Board of Immigration Appeals from the District Director's Office of Immigration in Phoenix, Arizona.

7. When the record was sent to the Board of Immigration Appeals, the above referred to Order was apparently not included therein. The Board of Immigration Appeals in its decision of September 25th, 1978, stated that "The Respondent's Petition for expungement of that conviction apparently has not been favorably acted upon."

8. On February 16th, 1979, Applicant again filed an application for advance permission to return to unrelinquished domicile, pursuant to 8 USC §1182 (c).

9. On March 19, 1979, the Petitioner filed a Petition for Review with the United States Court of Appeals, Ninth Circuit, pursuant to 8 USC §1105 A.

10. Pursuant to stipulation, Ninth Circuit proceedings were stayed pending the ruling by the Board of Immigration Appeals on a Motion to Reopen or Reconsider Petitioner's situation because of the problem in paragraph 7.

11. Pursuant to that stipulation and Motion to Reopen or Reconsider, on July 20th, 1979, the Board of Immigration Appeals responded. The Motion to Reopen or Reconsider was denied. After the Memorandum decision of the Ninth Circuit filed April 30th, 1980, a Petition for Rehearing En Banc was denied. A Motion for Stay of Mandate was then granted and this Petition for Writ of Certiorari has been filed.

D. The two issues presented for

review in this Petition for Writ of Certiorari are the same issues that were presented for review in the Ninth Circuit both in the Brief for Petitioner and in Oral Argument. The Memorandum Decision of April 30th, 1980, of the Ninth Circuit, clearly reflects these issues were the ones decided.

E. The basis for Federal Jurisdiction of the Court in the First Instance was 8 USC §1105 A.

F. This case is particularly ripe for decision by the United States Supreme Court because of Rule 17. Specifically there is a conflict between the various Courts of Appeals as to the specific questions presented for review. Briefly, those questions are:

1. The availability of a waiver of deportability pursuant to 8 USC §1182 (c), and,

2. The efficacy of a State restoring a person's civil rights in reference to

deportability pursuant to 8 USC §1251 (a)(11).

These are important questions which should be settled by the Supreme Court so that there may be uniformity of decisions in the various Circuits.

Indicative of the conflict between the Circuits are cases on one side favoring non-deportability such as Morera vs. INS 462 F2d 1030 (1st Circuit - 1972) and Rheman vs. INS 544 F2d 71 (2nd Circuit - 1976). Doe vs. Webster 606 F2d 1226 (D.C. Circuit 1979) provides a background discussion of restoration of civil rights. See also Re J (1957, Board of Immigration Appeals) 7 I & N Dec. 580 which held an alien was not convicted within 8 USC §1251 (a)(11) where imposition of sentence was postponed. (Tapia's imposition of sentece was suspended). Or Re Werk (1977, Board of Immigration Appeals) I & N Interim Dec. No. 2589 where a conviction expunged under 21 USC §844 (b)(1), or state counterpart, may not be used as a

basis for deportability. Opposite holdings favoring deportability in the Ninth Circuit in such cases as: Ocon - Perez vs. INS 550 F2d 1153 (1977), De la Cruz - Martinez vs. INS 404 F2d 1198 (1968), Cert. denied 394 U. S. 955 (1969), and Kelly vs. INS 349 F2d 473 Cert. denied 382 U. S. 932 (1965). Some decisions in the Fifth Circuit support this position. Gonzalez de Lara vs. U.S. 439 F2d 1316 (1971). Gutierrez - Rubio vs. INS 453 F2d 1243 (1972).

On the issue of discretionary relief pursuant to 8 USC §1182 (c) it was conceded by the Assistant Attorney General at Oral Argument in the Ninth Circuit, that the Ninth Circuit, alone among the Circuits denies this discretionary relief for Defendants in drug-related cases. This denial of discretionary relief is reflected in such cases as Bowe vs. INS 597 F2d 1158 (1979) and Dunn vs. INS 499 F2d 856 (1974) Cert. denied 419 U.S. 1106 (1975). However,

The Board of Immigration Appeals in Re Hinojosa (1979) I & N Interim Dec. No. 2718 held 8 USC §1182 (c) applicable to such an alien. Also Re Tanori (1976) I & N Interim Dec. No. 2467.

Wherefore Petitioner requests that the two issues presented be reviewed and a uniform rule decided.

Respectfully submitted,

Wayne A. Cypert,
Attorney for Petitioner

APPENDIX INDEX

		PAGE:
1.	Board of Immigration Appeals Decision dated September 25, 1978;	I
2.	Board of Immigration Appeals Decision dated July 20, 1979;	V
3.	Court of Appeals for the Ninth Circuit Memorandum dated April 30th, 1980;	IX
4.	Court of Appeals for the Ninth Circuit Order dated June 12, 1980;	XIII
5.	Court of Appeals for the Ninth Circuit Order dated June 25, 1980;	XIV
6.	A.R.S. former §13-1741, 42, 44, and 45.	XV

Caption deleted,

Board of Immigration Appeals Decision dated September 25, 1978.

This case presents an appeal from a decision of the immigration judge on April 27, 1977, denying the Respondent's application for advance permission to return to an unrelinquished domicile, pursuant to the provisions of section 212(c) of the Immigration and Nationality Act, 8 USC 1182(c), as amended. The appeal will be dismissed.

The immigration judge noted that the respondent had a United States citizen wife and children and that he entered this country for lawful permanent residence in 1963. He found, however, that the Respondent had interrupted his unrelinquished domicile in the United States in June, 1971, when he was granted the privilege of voluntary departure, and thus was statutorily ineligible for section 212(c) relief. The immigration judge further noted that even

if the Respondent, who by now may have accumulated the requisite seven years of unrelinquished domicile in this country, was eligible for section 212(c) relief, he would have denied it in the exercise of administrative discretion. The immigration judge cited certain incidents involving marijuana, including the respondent's conviction and suspended sentence in 1976 for violation of Arizona Revised Statute 36-1003.06. The respondent's petition for expungement of that conviction apparently has not been favorably acted upon.

Section 212(c) of the Act provides in pertinent part:

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation and who are returning to a lawful, unrelinquished domicile for seven consecutive years may be admitted at the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraphs (30) and (31) of subsection (a)."

Although the statute describes a waiver available to an alien seeking to enter the United States, we have held, in reliance upon the decision in Francis v. INS, 532 F.2d 268 (2 Cir. 1976), that section 212(c) relief may also be granted in deportation proceedings to a nondeparting permanent resident alien with seven consecutive years of lawful unrelinquished domicile. See Matter of Silva, Interim Decision 2632 (BIA 1976). See also Matter of Varagianis, Interim Decision 2537 (BIA 1976); Lok v. INS, 548 F.2d 37 (2 Cir. 1977).

Our review of the record persuades us that denial of section 212(c) relief was proper in the circumstances of this case. Cf. Matter of Marin, Interim Decision 2666 (BIA 1978). The respondent is not a youth. His conviction is a comparatively recent one and suspension of his three year sentence will not expire until November 1, 1979 (Ex. 3). Although we recognize fully the respondent's residency in the United States

and his family equities, we find that these equities are not sufficient to overcome the adverse factors in this case. Accordingly, in the exercise of our administrative discretion, the appeal will be dismissed.

ORDER: The appeal is dismissed.

//s//
Chairman

Caption deleted.

Board of Immigration Appeals Decision dated July 20, 1979.

This case presents a motion to reopen these proceedings to reconsider our order dated September 25, 1978 1/, wherein we dismissed an appeal by the respondent from a decision of the immigration judge denying his application for advance permission to return to an unrelinquished domicile, pursuant to the provisions of section 212(c) of the Immigration and Nationality Act, as amended, 8 USC 1182(c). The motion will be denied.

As indicated in our initial decision, the respondent was convicted upon a plea of guilty and received a suspended sentence in 1976 for unlawful possession of marijuana, in violation of Arizona Revised Statute 36-1002.06. The Board had not then been made aware that the above conviction was

in fact already expunged by the Superior Court of the State of Arizona on May 23, 1977. Nevertheless, the respondent can gain no benefit in these deportation proceedings by the expungement of his narcotics conviction. The Ninth Circuit has held repeatedly that expungement of a narcotics conviction does not remove the conviction as a basis for deportation. See Brownrigg v. INS, 356 F.2d 877 (9 Cir. 1966); Kelly v. INS, 349 F.2d 473 (9 Cir. 1965). cert. denied, 382 U. S. 932 (1965); Garcia - Gonzalez v. INS, 344 F.2d 804 (9 Cir. 1965) cert. denied. 382 U.S. 840 (1965). These cases support the decision this Board is, of course, bound. The Attorney General noted 20 years ago, at page 445, that "Traffic in narcotics has been a continuing and serious Federal concern. Congress has progressively strenghtened the deportation laws dealing with aliens involved in such traffic." See also Hernandez-Almanza v.

INS, 547 F.2d 100 (9 Cir. 1976); Matter of Zingis, 14 I & N Dec. 621 (BIA 1974).

The respondent has conceded that he is deportable under section 241 (a)(11) of the Act, 8 USC 1251 (a)(11). His conviction had been based upon possession of 386 pounds of marijuana for sale, with an estimated value of $38,600. A waiver of excludability under section 212(c) of the Act is unavailable in the Ninth Circuit to any alien facing deportation for conviction of a drug-related crime, pursuant to section 241 (a)(11). See Bowe v. INS, No. 78-1496 (9 Cir. April 23, 1979); Nicholas v. INS, 590 F.2d 802, 808 (9 Cir. 1979); Dunn v. INS, 499 F.2d 856 (9 Cir. 1974) cert. denied, 419 U.S. 1106 (1975); Arias-Uribe v. INS, 466 F.2d 1198 (9 Cir. 1972); cf. Gutierrez v. INS. 323 F.2d 593 (9 Cir. 1963), cert. denied, 377 U.S. 910 (1964); Matter of Robinson, Interim Decision 2709 (BIA 1979). It would obviously be futile, therefore, to grant the motion to reopen

or reconsider because we could not, in the particular circumstances of this case, find the respondent eligible in a case reviewable only in the Ninth Circuit. We are obliged to follow the controlling precedents of the Court of Appeals in that circuit. 2/ Accordingly, we have no alternative but to deny the motion to reopen or reconsider. In view of our decision, we find that oral argument would not serve any useful purpose in this matter.

ORDER: The motion to reopen or reconsider is denied.

//s//
Chairman

1/ Consideration of a petition for review of our earlier decision has been stayed by the United States Court of Appeals for the Ninth Circuit pending our latest decision in this matter.

2/ We do so, however, while cognizant we have found that aliens with marijuana confictions in other circuits may be eligible for section 212(c) relief. See e.g. Matter of Varagianis, Interim Decision 2537 (BIA 1976); Matter of Silva, Interim Decision 2532 (BIA 1976).

Caption deleted,

Court of Appeals for the Ninth Circuit
Memorandum dated April 30, 1980

Tapia-Acuna petitions for review of a decision of the Board of Immigration Appeals (BIA) finding him deportable under 8 USC §1251 (a)(11)[1] on the ground that he had been convicted of unlawful possession of marijuana for sale.

Tapia-Acuna entered the United States in 1963 as an alien lawfully admitted for permanent residence. In October, 1976, Tapia-Acuna pled guilty to possession of marijuana for sale. In February, 1977, an Immigration Order to Show Cause and a Notice of Hearing were issued. The deportation hearing was held in April, 1977, at which time the immigration judge ordered Tapia-Acuna deported and denied discretionary relief pursuant to §212 (c) of the Immigration and Naturalization Act, 8 USC §1182 (c)[2].

In April, 1977, Tapia-Acuna appealed to the BIA, which affirmed the decision of the immigration judge in September, 1978. The BIA had not been informed, however, that Tapia-Acuna's 1976 conviction for possession of marijuana had been expunged under Arizona State law in May, 1977.

Tapia-Acuna filed a petition for review in this court on March, 19, 1979. He then filed a motion with the BIA to reopen and reconsider his case in light of the expungement. This court stayed review of the BIA's initial decision pending the BIA's action on the motion to reopen and reconsider. The BIA denied the motion, finding that deportation may be based on an expunged conviction, and that discretionary relief is unavailable to an alien convicted of a drug offense.[3]

A state conviction, even though expunged, retains its vitality for deportation purposes.

Ocon-Perez v. INS, 550 F.2d 1153, 1154 (9th Cir. 1977); de la Cruz-Martinez v. INS, 404 F.2d 1198, 1200 (9th Cir. 1968), cert. denied, 394 U.S. 955 (1969); Kelly v. INS, 349 F.2d 473, 474 (9th Cir.), cert. denied, 382 U.S. 932 (1965). Tapia-Acuna is, therefore, properly deportable under 8 USC §1251 (a)(11).

Discretionary relief under §212(c) is not available to an alien found deportable for conviction of a drug-related crime pursuant to 8 USC §1251 (a)(11). Bowe v. INS, 597 F.2d 1158 (9th Cir. 1979); Dunn v. INS, 499 F.2d 856 (9th Cir. 1974), cert. denied, 419 U. S. 1106 (1975). The BIA did not, therefore, abuse its discretion by finding Tapia-Acuna deportable and not eligible for discretionary relief.

AFFIRMED.

FOOTNOTES

1. 8 USC §1251 (a)(11) provides in pertinent part:

   (a) Any alien in the United States ... shall, upon the order of the Attorney General, be deported who --

   (11) is, or hereafter at any time after entry ... has been convicted of a violation of ... any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana, or who has been convicted of a violation of ... any law or regulation governing or controlling the ... sale, exchange, dispensing, giving away ... of ... marijuana ....

2. 8 USC §1182(c) provides in pertinent part:

   Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provision of paragraphs (1) - (25), (30) and (31) of subsection (a) of this section.

3. Tapia-Acuna did not file an additional petition for review with this court after BIA denied his motion to reopen and reconsider. Because of our disposition, we need not consider whether we may properly review the denial of that motion.

Caption deleted.

Court of Appeals for the Ninth Circuit
Order dated June 12, 1980.

The panel as constituted in the above case has voted to deny the petition for rehearing, and Judges Goodwin and Ferguson have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35 (b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Caption deleted.

Court of Appeals for the Ninth Circuit
Order dated June 25, 1980.

Upon due consideration of Petitioner's motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for Writ of Certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before July 18, 1980.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.*

//s//
United States Circuit Judge
FERGUSON

*In the event that the motion for stay of mandate and the petition for Writ of Certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

CA9-003- (12/3/79)

A.R.S. former §13-1741, 42, 44, and 45,

§13-1741. Definition

1. "Civil rights" means all the civil rights conferred on a person by the constitution and laws of this state and shall include the civil rights referred to in article 7, section 2 of the constitution of Arizona and §13-1653 of this title. Added Laws 1970, Ch. 221, §1.

§13-1742. Persons completing probation.

A. A person whose period of probation has been completed may have any civil rights which were lost or suspended by his felony conviction restored by the judge who discharges him at the end of the term of probation.

B. Upon proper application, a person who has been discharged from probation prior to the adoption of this article may have any civil rights which were lost or suspended by his felony conviction restored by the superior court judge by whom the person was sentenced or his successors in office from the county in which he was originally convicted. The clerk of such superior court shall have the responsibility for processing the application upon request of the person involved or his attorney. The superior court shall cause a copy of the application to be served upon the county attorney. Added Laws 1970, Ch. 221, §1. As Amended Laws 1971, Ch. 159, §1.

§13-1744. Setting aside judgment of convicted person upon discharge; making of application; release from disabilities; exceptions.

Every person convicted of a criminal offense other than a violation of §28-473, the provisions of title 28, chapter 6, or a violation of any local ordinance relating to stopping, standing or operation of a vehicle, but nevertheless including a violation of §28-661, 28-692, 28-692.02, 28-693 or any local ordinance relating to the same subject matter of such sections, may upon fulfillment of the conditions of probation or sentence and discharge by the court, apply to the judge, justice of the peace or magistrate who pronounced sentence or imposed probation or such judge, justice of the peace or magistrate's successor in office to have the judgment of guilt set aside. The convicted person shall be informed of this right at the time of discharge. The application to set aside the judgment may be made by the convicted person, by his attorney or probation officer authorized in writing. If the judge, justice of the peace or magistrate grants the application, the judge, justice of the pease or magistrate shall set aside the judgment of guilt, dismiss the accusations or information and order that the person be released from all penalties and disabilities resulting from the conviction other than those imposed by the department of transportation ....

§13-1745. Restoration of civil rights ...

The restoratio of civil rights and the dismissal of the accusation or information under the provisions of this article shall be in the discretion of the superior court judge by whom the person was sentenced or his successor in office. Added Laws 1970, Ch. 221. §1.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1980, I served three (3) copies of the foregoing Petition for Writ of Certiorari for Petitioner upon The Solicitor General by mailing said copies Air Mail, postage prepaid to:

The Solicitor General
Department of Justice
Washington, D. C. 20530

Wayne A. Cypert
555 Morley Avenue
Nogales, Arizona 85621
(602) 287-2519

Attorney for Petitioner